

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1971

No. 71-1398

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JOHN W. WARNER, SECRETARY OF NAVY,  
*Petitioner,*

—v.—

JOHN W. FLEMINGS

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT  
OF APPEALS FOR THE SECOND CIRCUIT

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## RELEVANT DOCKET ENTRIES

1970

October 8, 1970—Complaint Filed.

1971

January 29, 1971—ANSWER of deft U.S.A. filed. (affid of srv by mail on 1-29-71).

March 19, 1971—Letter of Michael Meltser & motion for summary judgment filed.

April 22, 1971—Notice of Cross-Motion and memorandum filed, pursuant to Rule 12(b), dismissing complaint, & Rule 56 for summary judgment in favor of deft etc. (ret April 27, 1971)

April 22, 1971—Statement of material facts filed.

April 22, 1971—Statement of material facts filed.

April 27, 1971—Before WEINSTEIN, J.—Hearing on deft's motion for summary judgment—Motion argued—Decision reserved for 60 days to all pr for administrative action—Order to be submitted.

April 30, 1971—By WEINSTEIN, J. Order filed that this Court retains jurisdiction pending Pltff's application to the Judge Advocate General, U.S. Navy & the Board for Correction of Naval Records, and final decision rendered. etc. this Court will proceed to a determination of the motions submitted (P/C mailed to attys).

May 18, 1971—Letter from Atty. for Pltff. to Judge Weinstein dtd. 5-14-71 and Affidavit of Pltff. John W. Flemings Filed.

July 19, 1971—By WEINSTEIN, J.—MEMORANDUM & ORDER FILED. Pltff's court-martial conviction for automobile theft must be vacated. His request that the Board for Correction of Naval Records be directed to grant him a general discharge under honorable conditions must be denied. etc. The offense of being absent without leave etc. The matter is remanded to the board with instructions to erase the conviction for automobile theft and the dishonorable discharge etc. (P/C mailed to attys).

September 16, 1971—NOTICE OF APPEAL FILED. (deft) (copy of appeal mailed to Michael C. Meltsner, Esq. Columbia University School of Law, 435 W. 116th St. N.Y.)

IN THE UNITED STATES FEDERAL DISTRICT  
COURT FOR THE EASTERN DISTRICT OF  
NEW YORK

---

Civil File No. 70C 1267

UNITED STATES OF AMERICA  
EX. REL. JOHN W. FLEMINGS, PLAINTIFF

v.

JOHN H. CHAFEE, Secretary of the Navy, DEFENDANT

COMPLAINT FOR A MANDATORY INJUNCTION

TO: The Honorable President Judge of the above court.

Come now, John W. Flemings, relator, who disposes and says he is a natural born citizen of the United States. That the Courts Martial and Dishonorable Discharge he received from the United States Navy is inconsistent with due process of law, as guaranteed him by the 5th and 6th Amendments of the Federal Constitution. That such abusive stigmatism he is still marked, chatters the very essential principles instituted in the Bill of Rights as intended by the Framers. Therefore, he comes before this Honorable Court to rectify the injustice bestowed upon him. Relator will tentatively show his Constitutional rights has been violated adduced from the following cogent facts.

JURISDICTION

Relator concedes that he does not know the proper act to invoke jurisdiction upon this Honorable Court. However, Relator would draw this Honorable Court's attention to other reference that seems merited heretofore; i.e.,

Chief Justice Earl Warren, The Bill of Rights and the military, 37 N.Y.U.L. Rev. 181 (1961); Henderson, Courts Martial and the Constitution: The Original Un-

derstanding, 71 Harv. L. Rev. 293 (1957); Avins, accused right to defense counsel before a military Court, 42 U. Det. L. J. #21 (1964); C. F. Wiener, Courts Martial and the Bill of Rights, 72 Harv. L. Rev. (1958).

### *Federal Constitutional Questions Involved*

1. Was Relator denied due process of law as embodied under the 5th and 6th Amendments of the Constitution of the United States, whereby: The military Tribunal Court of Justice lacked jurisdiction to Preside over the alleged offense of auto larceny which is outside the province of the Uniform Code of Military Justice; nor was he afforded counsel anterior to trial?

2. Was relator denied due process of law as embodied under the 6th Amendment of the Constitution of the United States, whereby: The court appointed counsel to represent him at trial was not a counsel as term under the 6th Amendment?

### STATEMENT OF CASE HISTORY

Relator at the age of eighteen (18) joined the United States Navy. After training at Great Lakes Illinois, I was sent to an ammunition Depo at Earl, New Jersey. One weekend I obtained a 72 hour leave, I decided to hitch-hike a ride to Pittsburgh, Pennsylvania, because of financial reasons. While on the road just outside of Norristown, Pennsylvania, a sailor stopped his car and gave me a lift.

When we road into Lewistown, Pennsylvania, it was noted that the gas tank was almost empty. He inquired whether I had any money. I informed him that I didn't have any money for gas because I was broke. The sailor informed me that he did not have enough money to buy the necessary gas, so he would have to try to make a deal with the two spare tires which were in the trunk of the car. When we arrived shortly thereafter to a gas station he took the aforementioned tores inside the station. Subsequently he and the Station Attendant came outside wherein some gas was put in the tank and we continued our journey on highway 322.

Around about dusk he pulled the car on the side of the road stopping in front of a farm house. He told me that he was going to the house to see if a friend was home and he would be right back. While I sat in the car awaiting for his return, two state troopers drove and stopped. One of the troopers came over to the car and asked me what I was doing there. I explained about the ride I had been given from an unknown fellow sailor and I was trying to reach Pittsburgh; and at the present time I was awaiting his return from the said house of his friend. Meanwhile, the trooper who stayed in their car observed the unknown sailor hightailing up a hill behind the said house.

The troopers took me to their barracks located in Hollidaysburg, Pennsylvania, where I then learned that the car was stolen.

After further questioning the state troopers took me back to the said gas station in order to find out if my statement was true or false. The gasoline attendant's statement and affidavit corroborates that I was not the person who drove the car nor the person who traded the two spare tires with him.

Consequently I was taken back to my base at Earl, New Jersey, which I did not see anybody for a period of eight or nine weeks. Then I was taken to Pier 92 and given a hearing, wherein it was incomplete by virtue I was not afforded the assistance of counsel, also the Constitutional Right of confrontation of the witnesses against me, whereas *notwithstanding no witnesses appeared at the said proceeding in regards the alleged offense*. Upon conclusion of the inexpressible said proceedings the judicial personnels told me that I would be recommended for a general Courts Martial.

Afterward I was taken to Hearts Island, New York, where I was lodged there for approximately five weeks, and then taken to the Brooklyn Navy Yard. While being at the latter place I met the said Lt. Folly whom informed me that he was appointed to represent my pending case. During the interview he advised me to enter a plea of guilty to the said charge because I would only get a "moderate sentence" instead of ten years; plus, the fact that the weight of the evidence was against me.

Thereafter I was carried back to Hearts Island, New York for about four days, and then brought back to the Brooklyn Naval Yard to stand trial. Being young at the age of 18 it's obvious that only through frustration and the complexities of law, I did unknowingly and unintelligently entered a plea of guilty before the Military Tribunal sitting en banc.

Upon the conclusion the said court found me guilty as charged, wherein the Court imposed a sentence of three years and stand committed at Portsmouth, New Hampshire after serving twenty-six months in confinement I was released and given a Dishonorable Discharge.

### SUMMARY OF ARGUMENT

Relator alleges that he was denied the very conception of the basic essential fundamental concept of due process, and such, is a deprivation of his personal liberties based upon the following grounds:

(1) The alleged offense of auto larceny is a civil and/or criminal litigation, but it does not come under jurisdiction of violation of the Uniform Code of Military Justice. Therefore the proceedings of the Military Tribunal in this case, was invalid and void without jurisdiction to proceed.

(2) It is a well established law that the accused has the constitutional right of confrontation to cross-examine the accusers against them.

Indeed it's impossible to fathom how in the world could a United States prosecutor present a prima facie case in view of the fact that there were no witnesses or corroborated statements introduced into evidence at the hearing nor at the trial itself.

(3) It is a settled law, that an indigent person is entitled the assistance of counsel as termed under the 6th Amendment by the Bill of Rights. And anything less thereto, is an enroachment of relators undividual personal liberties, and the abuse injustice that manifested in this case at bar, should be expunged forthwith, so that, justice will prevail.

## ARGUMENT

The record affirmatively shows that relator was given a preliminary hearing, without the assistance of counsel, for the alleged offense of auto larceny, before a military court contrary to conformity in due process it is settled law that an accused is entitled to counsel at all "critical stages" of the criminal litigation where rights may be preserved or lost. SEE *White v. Maryland*, 373 U.S. 59, 10 L. ed. 193, 83 S. Ct. 1050 (1963).

Relator alleges that since the said criminal offense was lodged against him, the sole jurisdiction lied within a civilian tribunal court of law, and not, within violation of the uniform code of Military Justice. SEE Application of James E. Stapley P.F.C., United States Army, for writ of Habeas Corpus; filed in United States District Court, District of Utah, at civil no. C-188-65 (1965).

Amendment V, of the Federal Constitution held in part: "Trials for crimes; . . . No person shall be held to answer for a capital, or otherwise infamous crime unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; . . . Nor shall any personal be subject for the same offense to be twice put in jeopardy of life or limb; Nor shall be compelled in any criminal case to be a witness against himself nor be deprived of life, liberty or property, without due process of law—"

In the light of the alleged offense of auto larceny that did not arise in any connection with the naval force, the action taken by the Military personnels was ab initio and lacked jurisdiction thereto. Therefore, the monstrous procedure that transpired resulted baing a denial of due process of law as instituted therein Amendment V(5) Supra.

It is further alleged as to said preliminary hearing that in the case of *Pointer v. Texas*, 380 U.S. 400 (1965) the United States Supreme Court held that the sixth Amendment guarantees a defendant the right "to be

confronted with the witnesses against him" which include the right to cross-examine those witnesses.

It is evident that since no witnesses appear at relator's hearing while being without counsel, nor did any witnesses appear before the Military Tribunal Court of Justice, wherein they could be cross-examined in regards of the truth or falsehood of the alleged offense, such proceedings, in itself constitutes a denial of the safeguards essential to a fair trial. Pointer supra.

Speaking of confrontation and cross-examination the United States Supreme Court ruled in the case of *Greene v. McFlory*, 360 U.S. 474, that "they have ancient roots. They find expression in the 6th Amendment which provides that in all criminal cases the accused shall enjoy the right "to be confronted with the witnesses against him." This court has been zealous to protect these rights from erosion—360 U.S., at 496-497.

Even if the Military Tribunal were authorized to adjudicate this instant case at bar, still relator was yet denied the basic fundamental rights as guaranteed him by the 6th Amendment which holds, i.e.;

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

Significantly, in the 6th Amendment the words "speed and public" qualify the term trial and the rest of the amendment defines specific protections the accused is to have at his trial. Ergo, the 6th Amendment, by its own terms, not only requires that the accused have certain specific rights but also that he enjoy them at a trial—a word with a meaning of its own, SEE *Bridges v. California*, 314 U.S. 252, 271.

The findings of fact and conclusions of law will clearly reveal that relator at the age of 18 did not understand-

ingly and intelligently enter a plea of guilty for the said offenses, after being influenced by his court-appointed counsel attorney, Lt. Folly. Furthermore, relator alleges that the said appointed counsel was a denial of due process as term specifically by the 6th Amendment, i.e.,

"In all criminal prosecutions, the accused shall enjoy the right . . . To have the assistance of counsel for his defense," whereas: The qualifications of appointed defense counsel in the courts martial of relator were not adequate to constitute "counsel" and as required by due process of law, but that on the contrary the representation of your relator was in the nature of idle form or mockery of justice.

Minimal requirements of due process particularly in view of the 6th Amendment requires that counsel made available to relator had requisite competency or qualification in military or civilian laws and proceedings, or both, beyond that common to every officer in the military service, application or Stapley P.F.C. United States Army, Supra.

On March 18, 1963, the Supreme Court of the United States, decided that an accused indigent person, as relator in this instant case, is entitled to the assistance of counsel in a non-capital, criminal prosecution. SEE, *Gideon v. Wainwright*, 372 U.S. 335 (1963). Upon remanding Gideon's case the court used the principal of retrospective application of a constitutional right. SEE also, *Novell v. Illinois* 373 U.S. 420 (1963); *Eskridge v. Washington*, 357 U.S. 214 (1957).

It is a long established principle that a denial of a fundamental constitutional right takes away the jurisdiction of the trial court and renders void a sentence and conviction following. SEE *ex Parte Nielson*, 131 U.S. 176 (1888); *Johnson v. Zerbst*, 304 U.S. 458 (1938).

Although relator has already served the injustice of said sentence, it may be alluded that the situation has now become moot. Presumably the mootness be the case, can it morally, conscientiously, or legally, under our system of jurisprudence, be sanctioned without any course of redress, indeed not, for it would be repugnant towards

the very fundamental guaranteed rights of the constitution is supposed to maintain.

Relator has clearly shown, that he was tried, convicted and sentenced, for auto larcency, by an unauthorized Military Tribunal of Justice; That he was denied the Constitutional right of confrontation, that he was denied the right to "Counsel" as term in the 6th Amendment of the Bill of Rights; and such resulted a Courts Martial and Dishonorable Discharge and forfeiture of pay.

As presented and argued, in this instance at bar, relator has unequivocally shown a direct violation of due process. SEE *Ashe v. McNamara*, — F.2d — C.A. 1, Dec. 14, 1965.)

Relator asserts that he has definitely shown this Honorable Court a Prima Facie case.

Wherefore, in due consideration of the merits set forth herein by a layman in law, relator prays that this Honorable Court will entertain the foregoing petition as being the appropriate remedy, thereby issuing and order declaring the monstrosity said procedures foregoing, being void, ab initio and without jurisdiction; and that the same great writ be granted as the law and statutes so demand.

And we will ever pray,

Respectfully Submitted,

/s/ John W. Flemings  
Relator (I.P.P.)

**AFFIDAVIT**

Appeared John Flemings, Relator, before me, the undersigned notary public, in and for the above said state and county, being sworn in accordance to law, deposes and says, that all the claims and allegations set forth in the foregoing petition is true and correct, to the best of his knowledge, information and belief.

/s/ John W. Flemings  
Relator

Sworn to and subscribed before me, this 5th day of October 1970.

/s/ PETER W. SLAVANIE  
(Notary Public)

JDP:BFS:pa  
[Illegible]  
F. 702098

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

Civil Action No. 70 C 1267

UNITED STATES OF AMERICA ex  
rel. JOHN W. FLEMINGS, PLAINTIFF

against

HON. JOHN H. CHAFEE, Secretary of the Navy,  
DEFENDANT

ANSWER

The defendant, UNITED STATES OF AMERICA, by its attorney, EDWARD R. NEAHER, United States Attorney for the Eastern District of New York, in answering the plaintiff's complaint, alleges:

*FIRST:* Denies each and every allegation contained in plaintiff's complaint, except admits that on October 2, 1944, Seaman Second Class John W. Flemings was tried by general court martial at the U. S. Navy Yard, New York, New York, on charges of absence from station and duty after leave had expired and theft. Seaman Second Class Flemings pleaded guilty to both charges and was, accordingly, found guilty of both. The Court sentenced Seaman Second Class Flemings to be reduced to the rating of apprentice seaman, to be confined for a period of three years, and then to be dishonorably discharged. (A copy of those court martial proceedings is attached hereto as Exhibit 1.)

AS AND FOR A FIRST SEPARATE AND  
COMPLETE AFFIRMATIVE DEFENSE

*SECOND:* This action is barred because it was not commenced within the applicable statute of limitations for this type of action.

WHEREFORE, defendant, HON. JOHN H. CHAFEE, demands judgment dismissing the plaintiff's com-

plaint and granting judgment to it, together with the costs and disbursements of this action, and for such other and further relief as to this Court may seem just and proper.

Dated: Brooklyn, New York, January 29, 1971

EDWARD R. NEAHER  
United States Attorney  
Eastern District of New York  
Attorney for Defendant

By /s/ Bruce F. Smith  
BRUCE F. SMITH  
Assistant U. S. Attorney

## EXHIBIT 1

Case of

JOHN W. FLEMINGS, Seaman second class, U.S.  
Naval Reserve, 2 October 1944. 924-24-27

RECORD OF PROCEEDINGS

OF A

GENERAL COURT MARTIAL

CONVENED AT

THE NAVY YARD, NEW YORK

BY ORDER OF

[Illegible]

Copy furnished

A17-20  
DHq-15

rem

HEADQUARTERS THIRD NAVAL DISTRICT  
FEDERAL OFFICE BUILDING  
90 CHURCH STREET  
NEW YORK, N.Y.

15 September 1944.

To: Rear Admiral Lamar R. Leahy, U.S. Navy, Retired,  
U.S. Navy Yard, New York, New York.

Subj: Precept for a General Court Martial.

1. Pursuant to the authority vested in me by the Secretary of the Navy (Navy Department's file A17-11 (1)/A17-20, dated 24 July 1943), a GENERAL COURT MARTIAL is hereby ordered to convene at the U.S. Navy Yard, New York, New York, at 10 o'clock a. m., on Monday, 18 September 1944, or as soon thereafter as practicable, for the trial of such persons as may be legally brought before it.

2. The court is composed of the following members, any five of whom are empowered to act, viz:

Rear Admiral Lamar R. Leahy, U.S. Navy, Retired,  
Captain James H. Tomb, U.S. Navy, Retired, Captain  
William K. Riddle, U.S. Navy, Retired, Commander  
Walter M. A. Wynne, U.S. Navy, Retired, Major Robert  
E. Adams, U.S. Marine Corps, Retired, Major Louis  
E. Fagan, Junior, U.S. Marine Corps, Retired, Major  
Arthur H. Turner, U.S. Marine Corps, Retired, Lieutenant  
Commander Townsend H. Boyer, D-V(G), U.S.  
Naval Reserve, Retired,

and of Lieutenant Commander Allen Blank, L-V(S), U.S.  
Naval Reserve, Lieutenant Commander Thomas H. Davis  
D-V(S), U.S. Naval Reserve, Lieutenant Commander  
Francis M. Seaman, L-V(S), U.S. Naval Reserve, Lieutenant  
Charles L. Larson, D-V(S), U.S. Naval Reserve,  
and Lieutenant Edmund J. Fanning, D-V(S), U.S. Naval

Reserve, as judge advocates, any one of whom is authorized to act as such.

3. This court is hereby authorized and directed to take up such cases, if any, as may be now pending before the general courts-martial of which Rear Admiral Lamar R. Leahy, U.S. Navy, Retired, is president, appointed by my precepts of 3 April 1944, 10 May 1944, and 27 July 1944, except such cases the trial of which may have been commenced.

4. No other officers can be detailed without injury to the service.

5. Detachment of an officer from his ship or station does not of itself relieve him from duty as a member or judge advocate of a court. Specific orders for such relief are necessary.

6. This employment on shore duty is required by the public interests. You will inform the above-named members and the judge advocates who were appointed by said precepts of 3 April 1944, 10 May 1944, and 27 July 1944, that they will continue on court martial duty under their previous orders. The court is authorized to adjourn over any holiday prescribed by article 330, U.S. Navy Regulations, 1920.

/s/ W. R. Munroe  
W. R. MUNROE  
Rear Admiral, U.S. Navy,  
Commandant, Third Naval  
District, Task Force  
Commander, Eastern Sea  
Frontier.

A true copy. Attest:

/s/ Allen Blank  
ALLEN BLANK  
Lt. Comdr. USNR  
Judge Advocate.

ND3/A17  
DHq-15

HEADQUARTERS THIRD NAVAL DISTRICT  
FEDERAL OFFICE BUILDING  
90 CHURCH STREET  
NEW YORK, N.Y.

924-94-27

WS:bh

(2909)

21 September 1944.

To: Judge Advocate, General Court-Martial, U.S. Navy  
Yard, New York, New York, convened by Comandant,  
Third Naval District, and Task Force Commander,  
Eastern Sea Frontier precept dated 15 September 1944.

Subj: Charges and specifications in the case of John W.  
FLEMINGS, seaman second class, U. S. Naval Reserve.

1. The above named man will be tried before the  
general court martial, of which you are judge advocate,  
upon the following charges and specifications. You will  
notify the president of the court accordingly, inform the  
accused of the date set for the trial, and summon all  
witnesses both for the prosecution and the defense.

CHARGE I

ABSENCE FROM STATION AND DUTY AFTER  
LEAVE HAD EXPIRED

SPECIFICATION

In that John W. Flemings, seaman second class, U. S.  
Naval Reserve, having, while so serving on active duty  
at the U. S. Naval Barracks, Naval Ammunition Depot,  
Earle, New Jersey, been granted leave of absence from  
his station and duty at said barracks, to which he had  
been regularly assigned, said leave to expire on 7 August  
1944, did fail to return to his station and duty as afore-  
said upon the expiration of said leave, and did remain  
absent from the U. S. naval service, without leave from

proper authority, for a period of about thirteen days, at the expiration of which he was delivered at the Naval Training School, Hollidaysburg, Pennsylvania; the United States then being in a state of war.

## CHARGE II

### THEFT

#### SPECIFICATION

In that John W. Flemings, seaman second class, U. S. Naval Reserve, while so serving on active duty at the U. S. Naval Barracks, Naval Ammunition Depot, Earle, New Jersey, did, on or about 18 August 1944, in Trenton, New Jersey, feloniously take, steal, and carry away from the possession of one Ernest Bush, a civilian, a 1942 Chevrolet Sedan automobile of the value of about twelve hundred dollars (\$1200.00), said automobile being the property of the said Bush, and he, the said Flemings, did then and there appropriate the same to his own use; the United States then being in a state of war.

/s/ W. R. Munroe

W. R. MUNROE

Rear Admiral, U. S. Navy,  
Commandant, Third Naval  
District, and Task Force  
Commander, Eastern Sea  
Frontier.

## NAVY YARD, NEW YORK, N. Y.

Monday, 2 October 1944.

The court met at 2:45 a. m.

Present: Rear Admiral Lamar R. Leahy, U.S. Navy, Retired, Captain James H. Tomb, U.S. Navy, Retired, Captain William K. Riddle, U.S. Navy, Retired, Commander Walter M. A. Wynne, U.S. Navy, Retired, Major Robert E. Adams, U.S. Marine Corps, Retired, Major Louis E. Fagan, Junior, U.S. Marine Corps, Retired, Major Arthur H. Turner, U.S. Marine Corps, Retired, Lieutenant Commander Townsend H. Boyer, U.S. Naval Reserve, Retired,

members, and

Lieutenant Commander Allen Blank, U.S. Naval Reserve, judge advocate.

The judge advocate introduced Joseph T. Gaynor, C/Y, USNR as reporter.

The accused entered and requested that Lieutenant George B. Foley; U.S. Naval Reserve act as his counsel. Lieutenant Foley took seat as counsel for the accused.

The judge advocate read the precept, copy prefixed marked "A".

The accused stated that he did not object to any member.

The judge advocate, each member, and the reporter were duly sworn.

The accused stated that he had received a copy of the charges and specifications preferred against him on 25 September 1944.

The judge advocate asked the accused if he had any objection to make to the charges and specifications.

The accused replied in the negative.

The court announced that it found the charges and specifications in due form and technically correct.

The accused stated that he was ready for trial.

No witnesses not otherwise connected with the trial were present.

The judge advocate read the letter containing the charges and specifications, original prefixed marked "B", and arraigned the accused as follows:

Q. John W. Flemings, seaman second class, U.S. Naval Reserve, you have heard the charges and specifications preferred against you; how say you to the specification of the first charge, guilty or not guilty?

A. Guilty, sir.

Q. To the first charge, guilty or not guilty?

A. Guilty, sir.

Q. To the specification of the second charge, guilty or not guilty?

A. Guilty, sir.

Q. To the second charge, guilty or not guilty?

A. Guilty, sir.

The accused was duly warned as to the effect of his pleas.

The accused persisted in his pleas.

THE PROSECUTION OFFERED NO EVIDENCE.

THE DEFENSE OFFERED NO EVIDENCE.

The accused did not desire to make a statement.

The judge advocate desired to make no opening argument.

The accused desired to make no argument and submitted his case to the court.

The trial was finished.

The judge advocate was directed to record the following findings:

The specification of the first charge proved by plea and that the accused, John W. Flemings, seaman second class, U.S. Naval Reserve, is of the first charge guilty.

The specification of the second charge proved by plea. And that the accused John W. Flemings, seaman second class, U.S. Naval Reserve is of the second charge guilty.

The accused did not wish to offer any matter in mitigation, extenuation or as to previous good character.

The judge advocate stated that he had no record of previous conviction, that the rate of pay of the accused is \$54 a month, that he was inducted on May 11, 1944 to serve for the duration of the war, and gave as his date of birth, January 9, 1926.

The court was cleared.

The judge advocate was recalled and directed to record the sentence of the court as follows:

The court therefore, sentences him, John W. Flemings, seaman second class, U.S. Naval Reserve, to be reduced to the rating of Apprentice Seaman, to be imprisoned for a period of three (3) years, then to be dishonorably discharged from the United States naval service and to suffer all the other accessories of said sentence as prescribed by Section 622 Naval Courts and Boards.

/s/ Lamar R. Leahy  
 LAMAR R. LEAHY  
 Rear Admiral, U. S. Navy,  
 Retired, President

/s/ James H. Tomb  
 JAMES H. TOMB  
 Captain, U. S. Navy,  
 Retired, Member

/s/ William K. Riddle  
 WILLIAM K. RIDDLE  
 Captain, U. S. Navy, Retired,  
 Member

/s/ Walter M. A. Wynne  
 WALTER M. A. WYNNE  
 Commander, U. S. Navy,  
 Retired, Member

/s/ Robert E. Adams  
 ROBERT E. ADAMS  
 Major, U. S. Marine Corps,  
 Retired, Member

/s/ Louis E. Fagan, Junior  
 LOUIS E. FAGAN, JUNIOR  
 Major, U. S. Marine Corps,  
 Retired, Member

/s/ Arthur H. Turner  
 ARTHUR H. TURNER  
 Major, U. S. Marine Corps,  
 Retired, Member

/s/ Townsend H. Boyer  
 TOWNSEND H. BOYER  
 Lieutenant Commander, U. S.  
 Naval Reserve, Retired,  
 Member

/s/ Allen Blank  
 ALLEN BLANK  
 Lieutenant Commander, U. S.  
 Naval Reserve, Judge  
 Advocate

The court then at 2:50 p. m. adjourned until 10:00  
 a. m. tomorrow, Tuesday, 3 October 1944.

/s/ Lamar R. Leahy  
 LAMAR R. LEAHY  
 Rear Admiral, U.S. Navy,  
 Retired, President

/s/ ALLEN BLANK  
 ALLEN BLANK  
 Lieutenant Commander, U.S.  
 Naval Reserve, Judge  
 Advocate

ND3/A17-20/  
DHq-15

HEADQUARTERS THIRD NAVAL DISTRICT  
FEDERAL OFFICE BUILDING  
90 CHURCH STREET  
NEW YORK, N. Y.

924-94-27  
(2909)

HPB:hl

Oct 7—1944

The proceedings, findings, and sentence of the general court martial in the foregoing case of John W. Flemings, seaman second class, U. S. Naval Reserve, are approved.

/s/ W. R. Munroe  
W. R. MUNROE  
Rear Admiral, U. S. Navy,  
Commandant, Third Naval  
District, and Task Force  
Commander, Eastern  
Sea Frontier

HEADQUARTERS THIRD NAVAL DISTRICT  
FEDERAL OFFICE BUILDING  
90 CHURCH STREET  
NEW YORK, N. Y.

924-94-27  
(2909)

HPB:hl

Oct 7—1944

DISTRICT GENERAL COURT MARTIAL  
ORDER NO. 3875-14

1. On 2 October 1944, John W. Flemings, seaman second class, U. S. Naval Reserve, was tried by general court martial at the U. S. Navy Yard, New York, New York, by order of the Commandant, Third Naval District, and Task Force Commander, Eastern Sea Frontier, on the following charge and specifications:

CHARGE I:

ABSENCE FROM STATION AND DUTY AFTER  
LEAVE HAD EXPIRED (one specification—from 7  
August 1944-20 August 1944).

CHARGE II:

THEFT (one specification).

FINDINGS:

The court found the specifications of the charges proved by plea and that the accused was of the charge guilty.

SENTENCE:

The court sentenced the accused to be reduced to the rating of apprentice seaman, to be confined for a period of three (3) years months, then to be dishonorably discharged from the United States naval service, and to suffer all the other accessories of said sentence as prescribed by section 622, Naval Courts and Boards.

2. The convening authority this day placed the following remarks on the record in this case:

"The proceedings, findings, and sentence of the general court martial in the foregoing case of [Illegible].

The U. S. Naval Prison, Portsmouth, New Hampshire, is designated as the place of confinement."

/s/ W. R. Munroe  
W. R. MUNROE  
Rear Admiral, U. S. Navy,  
Commandant, Third Naval  
District, and Task Force  
Commander, Eastern  
Sea Frontier

IN THE  
UNITED STATES DISTRICT COURT  
FOR THE  
EASTERN DISTRICT OF NEW YORK

Civil Action No. 70-C-1267

JOHN W. FLEMINGS, PLAINTIFF

v.

JOHN N. CHAFFE, Secretary of the Navy, DEFENDANT

MOTION FOR SUMMARY JUDGMENT

Plaintiff, by his undersigned counsel, moves the Court as follows:

1. That it enter, pursuant to Rule 56 of the Federal Rules of Civil Procedure, a summary judgment in plaintiff's favor for the relief demanded in the complaint on the ground that there is no genuine issue as to any material fact and that plaintiff is entitled to a judgment as a matter of law;

2. In the alternative, if summary judgment is not rendered in plaintiff's favor upon the whole case or for all the relief asked and a trial is necessary, that the Court, at the hearing on this motion, by examining the pleadings and the evidence before it and by interrogating counsel, ascertain what material facts are actually and in good faith controverted, and thereupon make an order specifying the facts that appear without substantial controversy and directing such further proceedings in the action as are just.

This motion is based upon all affidavits, pleadings, and exhibits filed herein.

WHEREFORE, plaintiff moves this Court enter a summary judgment granting plaintiff expungement of his dishonorable discharge and entitling him to a discharge on honorable conditions.

Respectfully submitted,

/s/ Michael Meltsner  
MICHAEL MELTSNER  
435 West 116 Street  
New York, New York 10027  
(212) 280-3867  
Attorney for Plaintiff

IN THE  
UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NEW YORK

No. 70/C/1267

JOHN W. FLEMINGS, PLAINTIFF

v.

JOHN N. CHAFFE, Secretary of the Navy, DEFENDANT

STATE OF NEW YORK	)	
	)	ss.:
STATE OF NEW YORK	)	

AFFIDAVIT

MICHAEL MELTSNER, being duly sworn, deposes and says that:

I am a member of the Bar of the State of New York and affirm under penalty of perjury that the following is true, except where alleged on information and belief, and as to such statements I do believe them to be true. My office address is 435 West 116 Street, New York, New York 10027. On October 16, 1970 I was appointed by this Court to represent JOHN W. FLEMINGS, No. C7322, Box A, R.F.D. 3, Bellefonte, Pennsylvania 16823, in his above-styled action against the Secretary of the Navy. This affidavit is submitted in support of plaintiff's motion for summary judgment.

Subsequent to my appointment I corresponded with Mr. Flemings and with officials of the Office of the Judge Advocate General, and Board for Correction of Naval Records, Department of the Navy in order to obtain a full and accurate statement of the facts pertinent to Mr. Flemings' claim that he is entitled to a discharge under honorable conditions and to expunge-ment of a dishonorable discharge received from the United States Navy on or about October 23, 1946.

My investigation reveals that a copy of record of proceedings of the general court-martial held October 2, 1944 in the case of, then, Seaman 2nd Class, John W. Flemings, United States Naval Reserve, 924 24 27 as appended to the answer filed by defendant in this action on or about January 29, 1971 is a true and accurate record of said proceedings and apparently constitutes the only available transcript.

By letter of October 29, 1970, a copy of which is attached and incorporated herein as Exhibit A, I wrote Charles E. Curley, Executive Secretary, Department of the Navy, Board for Correction of Naval Records, requesting that the Board provide me with pertinent portions of Mr. Flemings' application for a change of his dishonorable discharge to a discharge under honorable conditions. Mr. Curley responded by letter of November 12, 1970 enclosing portions of Mr. Flemings' file. The letter and enclosures are attached and incorporated herein as Exhibit B. Exhibit B reveals, *inter alia*, that the Board for Correction of Naval Records denied plaintiff's application on the merits after considering his naval records, pertinent provisions of law together with additional material submitted in support of the application. Mr. Flemings was informed of the Board's action by letter of May 29, 1968. Mr. Flemings, therefore, has exhausted only the administrative remedy available to him to seek the relief he prays from this Court.

On January 9, 1971, at my direction an associate wrote the office of the Judge Advocate General, Department of the Navy, to inquire whether at the time of Mr. Flemings' 1944 conviction for absence without leave and theft and subsequent sentence to confinement, loss of privileges and pay, and discharge upon less than honorable conditions, a general court-martial convened pursuant to the authority conferred by the Secretary of the Navy was authorized to discharge a seaman under less than honorable circumstances for the offense of absence without leave. A copy of a reply to this letter from Captain K. A. Konopisos, JAGC U.S. Navy, is attached and incorporated herein as Exhibit C. Captain Konopisos confirms the understanding of plaintiff's counsel that a

dishonorable discharge was authorized for theft but not for two week absence without leave by the articles for the Government of the Navy and Naval Courts and Boards, the Navy Manual for Courts-Martial, in force at the time of plaintiff's court-martial. After diligent search of the available regulations of the Department of the Navy, counsel has been unable to verify the statements contained in Exhibit C by citation to a specific regulation or order. Nevertheless, the statements contained therein are consistent with counsel's research and counsel believes them to be true.

Dated: New York, New York—March 19, 1971.

/s/ Michael Meltsner  
MICHAEL MELTSNER  
435 West 116 Street  
New York, New York 10027  
(212) 280-3867  
Attorney for Plaintiff

Subscribed and sworn to before me this 19 day of March, 1971.

/s/ Cecelia Schlesinger  
CECELIA SCHLESINGER  
Notary Public

## EXHIBIT B

[SEAL]

DEPARTMENT OF THE NAVY  
BOARD FOR CORRECTION OF NAVAL RECORDS  
WASHINGTON, D. C. 20370

CEC:mas

12 November 1970

Michael Meltser, Esquire  
Columbia University School of Law  
435 West 116th Street  
New York, New York 10027

Dear Mr. Meltser:

This is in reply to your letter of 29 October 1970 in the interest of Mr. John W. Flemings, who petitioned this Board by an application, DD 149, dated 23 February 1967, to change a dishonorable discharge dated 26 October 1946 to a discharge under honorable conditions.

Although Mr. Flemings did not file his application prior to 26 October 1961, or within three years after he discovered the alleged error or injustice, as required by 10 USC 1552, records pertaining to his naval service were assembled and reviewed. His application was denied and he was advised of the denial by the Board's letter of 29 May 1968.

Records pertaining to Mr. Flemings' service are not presently available. However, I am enclosing a summary of his case which was prepared from his records at the time the Board denied the application. You will note that the date of discharge was 23 October 1946. Enclosed also are copies of Mr. Flemings' application, DD 149, dated 23 February 1967, and of the Board's letter of 29 May 1968.

Mr. Flemings should have received a copy of the general court-martial after 2 October 1944. An additional copy

was furnished to him by the Office of the Judge Advocate General, probably in 1966. If he doesn't have a copy now and you desire a copy, you should send a letter request to the Office of the Judge Advocate General (20), Department of the Navy, Washington, D. C. 20370. There is a charge of approximately twelve cents a page, payable in advance. Upon receipt of a request that office will obtain the record and advise as to the cost.

Mr. Flemings may obtain a copy of his discharge certificate by addressing a letter request to National Personnel Records Center (Military Personnel Records), 9700 Page Boulevard, St. Louis, Missouri 63132.

I trust that the foregoing, together with the information contained in the enclosures, will be of assistance.

Sincerely yours,

/s/ Charles E. Curley  
CHARLES E. CURLEY  
Executive Secretary

Encls

## BOARD FOR CORRECTION OF NAVAL RECORDS

## NAME:

Docket No.: 993-67

FLEMINGS, John W., ex-AS, USNR, 924 94 27  
 P. O. Box 9901  
 Pittsburgh, Pennsylvania 15233

## NATURE OF HEARING REQUESTED:

Oral. Does not desire to appear in person, but designates counsel (American Legion).

## ACTION REQUESTED:

Change of DD to a General Discharge.

## INJUSTICE ALLEGED:

"I wasn't allowed to say anything during my court-martial, other than what I was told to say, there was other evidence that never came out during my court-martial.

"I could not have taken any ones automobile, because I did not know how to drive, it was impossible for me to have drove any ones automobile from New Jersey to where I was pick up at." (sic)

## SERVICE FACTORS:

Date of birth:	9 January 1926
Date of enlistment:	11 May 1944
Date of discharge:	23 October 1946
Type of discharge:	DD
Highest rating	S2c
GCT:	33
Education:	10 years
Prior service:	None

## DISCIPLINARY RECORD:

- 7 Aug 1944—AOL this date from 0700
- 20 Aug 1944—Apprehended by civil authorities at Boalsburg, Pa., Route 322, College Township, Center County, at 9:15, 18 August 1944 driving 1941 Chev. Sedan, stolen from Trenton, N.J., with stolen Penna. License 940F6. Delivered at NT Sch (Radio), Hollidaysburg, Pa., at 1500, 20 August 1944.

- GCM 2 Oct 1944— (1) AOL from 7 August 1944 to 20 August 1944, and Reduction to AS, confinement for 3 years, then to be dishonorably discharged from the service and to suffer all accessories of said sentence.
- (2) Theft
- 7 Oct 1944—CA approved proceedings, findings and sentence of GCM.
- 24 Oct 1944—Transferred to Naval Prison at Portsmouth, New Hampshire for confinement.
- CM 11 Jul 1945—Causing disturbance, lying, insolence to sentry, direct disobedience 5 days on B&W; 5 days loss of good time.
- CM 24 Jul 1945—Direct disobedience of orders; refusing to work, insolence 2 days on B&W.
- CM 17 Aug 1945—Disobedience of orders (inciting a riot—insolence) 5 days B&W in isolation, including equivalent loss of good time.
- CM 4 Mar 1946—(1) Leaving work detail without permission; 2 days on B&W, loss of equivalent good time.
- (2) Caught going to cell block tunnel, should have been in Annex alley
- CM 18 Apr 1946—Fighting and inciting a riot 2 days on B&W.
- CM 13 May 1946—Dirty clothes hidden in locker; contraband picture magazine; 2 books with library stamps but not checked out by anyone. 2 days on B&W; third class 2 weeks.
- CM 6 Jun 1946—Contraband in his possession, (1) extra pair of work grays, and (1) magazine 3rd class status.
- CM 22 Jun 1946—Threatening the tier captain, using obscene language toward him. Direct disobedience of orders 5 days on B&W, including equivalent loss of good time.

- CM 14 Aug 1946—Using obscene language, insolence, skylarking and direct disobedience of orders 2 days on B&W and equivalent loss of good time.
- CM 27 Aug 1946—Laughing and sitting down during 1930 count 1 week isolation.
- CM 30 Sep 1946—Hand on sentry. Disrespect to sentry. Bucking the chow line. Insubordination. Direct disobedience of orders. Refusing to give up work card "Thirty (30) days good time." [loss of].
- 23 Oct 1946—CO returned 30 days good time this date, and discharged with a DD at USNDB, Portsmouth, New Hampshire.

### COMMENTS ON GCM:

On 2 October 1944, Petitioner was tried by GCM at the Navy Yard, New York, for (1) absence over leave for a period of thirteen days from 7 August 1944, and from the U. S. Naval Barracks, Naval Ammunition Depot, Earle, New Jersey, at the expiration of which he was delivered, at the Naval Training School, Hollidaysburg, Pennsylvania; the U. S. then being in a state of war; and (2) theft, in that on 18 August 1944, in Trenton, New Jersey, he did feloniously take, steal and carry away from the possession of one Ernest Bush, a civilian, a 1942 Chevrolet Sedan of the value of \$1,200 said auto being the property of the said Bush, and he (Petitioner) did then and there appropriate the same to his own use; the U.S. then being in a state of war. Petitioner had counsel, and pleaded guilty to all charges and specifications. He did not desire to make a statement and the court found him guilty upon his pleas. He did not wish to offer matter in mitigation, extenuation or as to previous good character, and the court thereupon fixed his punishment at reduction to AS, confinement for 3 years, a DD, and to suffer the accessories of said sentence.

### CONFINEMENT:

While Petitioner was in confinement he was seen by a psychiatrist on at least four occasions. On 10 July 1946,

the psychiatrist reported that Petitioner was considered normal, and that there was no evidence of any psychopathic or neuropathic traits. Further, that Petitioner was not considered good material for restoration. Petitioner's infractions while in confinement were commented on, and his conduct was considered unsatisfactory. The local clemency board did not recommend either clemency or restoration, and the CO concurred.

#### ADDITIONAL:

Petitioner is presently in the State Correctional Institution, at Pittsburgh, Pennsylvania, where he was admitted in early 1964. His records also reflect that he was in the U. S. Penitentiary at Atlanta, Georgia, in 1954, serving a sentence of 34 months for interstate transportation of a stolen motor vehicle.

#### CONCLUSION:

There is no evidence of probable error or injustice in this case. He was convicted of an infamous crime while in service, and his confinement was marked with numerous infractions. His punishment was not too severe for his offenses, and he was not resterable material in view of the type of his offense, as well as his prison conduct.

#### RECOMMENDATION:

Deny.

Respectfully submitted,

/s/ Oscar M. Fair, Jr.  
OSCAR M. FAIR, JR.



[SEAL]

DEPARTMENT OF THE NAVY  
BOARD FOR CORRECTION OF NAVAL RECORDS  
WASHINGTON, D. C. 20370

CEC:dls

29 May 1968

Mr. John W. Flemings  
P. O. Box 9901  
Pittsburgh, Pennsylvania 15233

Mr. Flemings:

My dear

Reference is made to your application for correction of your naval record under the provisions of Title 10 U.S.C. 1552.

Under long established rules followed by the courts and administrative boards, a presumption of regularity attaches to official records. Consonant therewith, the burden of proof is on a Petitioner to show by documentary evidence that an error has occurred or an injustice has been suffered.

Your allegations of error and injustice have been reviewed in accordance with administrative regulations and procedures applicable to the proceedings of this Board. Documentary material considered by the Board consisted of your application, together with all material submitted in support thereof, naval records, and pertinent statutes, regulations and policies.

After careful and conscientious consideration of the entire record, the Board determined that insufficient evidence has been presented to indicate probable material error or injustice. Accordingly, your application has been denied.

It is regretted that the circumstances of your case are such that favorable action cannot be taken. You are

privileged to submit new and material evidence for consideration. As explained above, however, the burden is on you to show that an error or injustice has occurred.

Sincerely yours,

CHARLES E. CURLEY  
Executive Secretary

Copy to: American Legion

By direction of the Chairman

## EXHIBIT C

[SEAL]

DEPARTMENT OF THE NAVY  
OFFICE OF THE JUDGE ADVOCATE GENERAL  
WASHINGTON, D. C. 20370

In Reply Refer to  
JAG:202.2:CAC:dat  
931

Feb 1 1971

Mr. Arthur T. Cambouris  
600 West 111th Street  
New York, New York 10025

Dear Mr. Cambouris:

Your letter of 9 January 1971 addressed to the Judge Advocate General of the Navy has been referred to me for reply.

Before answering your specific questions, it should be noted that prior to the enactment by Congress of the Uniform Code of Military Justice in 1950, each service operated under its own statute. Army courts-martial were governed by the Articles of War (A.W.), while the Navy proceeded under the Articles for the Government of the Navy (AGN). These laws governing the administration of justice in the Navy were codified in section 1200, title 34, of the United States Code. The Navy equivalent to the present Manual for Courts-Martial was entitled Naval Courts and Boards whereas the Army operated pursuant to their Manual for Courts-Martial. Executive Order No. 9267 of 9 November 1942, referred to in your second question, was applicable only to the Army, since its suspension provisions were limited to the 1928 Army Manual for Courts-Martial. Your inquiry regarding this Executive Order should, therefore, be referred to the Judge Advocate General of the Army for a definitive answer.

Your other questions are more easily resolved. The maximum punishment imposable by a Navy general court-martial upon an enlisted man for a two week unauthorized absence in October 1944, was confinement for six months plus an additional period of confinement equal to the period of absence, loss of all pay and allowance during a like period, reduction to the lowest enlisted pay grade, and a bad conduct discharge.

The maximum punishment imposable by a Navy general court-martial in 1944 for auto theft depended upon the punitive article under which the accused was tried. Assuming the vehicle was valued in excess of \$100, the maximum punishment for theft by an officer included dismissal, confinement for four years and total forfeiture of pay and allowances, while the maximum for an enlisted man was a dishonorable discharge, four years' confinement, total forfeitures and reduction to the lowest enlisted pay grade. If, on the other hand, the accused was charged with unauthorized use of a vehicle not the property of the United States, the maximum punishments were; for an officer, dismissal, three years' confinement and total forfeitures, and for an enlisted man, dishonorable discharge, three years' confinement, total forfeitures and reduction to the lowest enlisted pay grade.

I hope this information answers your inquiries.

Sincerely,

/s/ K. A. Konopisos  
K. A. KONOPISOS  
Captain, JAGC, U. S. Navy

JDP:BFS:eh

File No. 702098

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

Civil Action No. 70 C 1267

UNITED STATES OF AMERICA, ex rel.  
JOHN W. FLEMINGS, PLAINTIFF  
against

HON. JOHN H. CHAFEE,  
Secretary of the Navy, DEFENDANT

NOTICE OF CROSS-MOTION AND MOTION TO DISMISS

SIR:

PLEASE TAKE NOTICE that upon the annexed affidavit of Bruce F. Smith, Assistant United States Attorney, Eastern District of New York, sworn to the 21st day of April, 1971 and upon the plaintiff's motion papers for summary judgment returnable April 27, 1971, and upon all the pleadings and procedures heretofore had herein, the undersigned will cross move for an order pursuant to Rule 12(b) of the Federal Rules of Civil Procedure dismissing the plaintiff's complaint for lack of jurisdiction and for failure to state a claim upon which relief can be granted and an order pursuant to Rule 56 of the Federal Rules of Civil Procedure granting summary judgment in favor of the defendant and against the plaintiff upon the ground that there is no genuine issue of any material fact as to defendant's motion for summary judgment and that the defendant is entitled to a judgment as a matter of law and for such other and further relief as to this Court may seem just and proper.

Dated: Brooklyn, New York—April 21, 1971

Yours, etc.,

EDWARD R. NEAHER  
United States Attorney  
Eastern District of  
New York  
Attorney for Defendant  
United States Courthouse  
225 Cadman Plaza East  
Brooklyn, New York 11201

By: /s/ Bruce F. Smith  
BRUCE F. SMITH  
Assistant U. S. Attorney

To:

MICHAEL C. MELTSNER, ESQ.  
Attorney for Plaintiff  
Columbia University School of Law  
435 West 116th Street  
New York, New York 10027

JDP:BFS:eh

File No. 702098

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

Civil Action No. 70 C 1267

UNITED STATES OF AMERICA, ex rel.  
JOHN W. FLEMINGS, PLAINTIFF

against

HON. JOHN H. CHAFEE,  
Secretary of the Navy, DEFENDANT

AFFIDAVIT

STATE OF NEW YORK )  
COUNTY OF KINGS ) ss.:  
EASTERN DISTRICT OF NEW YORK )

BRUCE F. SMITH, being duly sworn, deposes and says:

He is an Assistant United States Attorney for the Eastern District of New York, and as such is familiar with and in charge of the above-captioned action.

This affidavit is submitted in support of defendant's motion to dismiss the complaint herein pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure and defendant's motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure.

Plaintiff was convicted by a general court-martial on October 2, 1944, of the crimes of being absent without leave and felonious theft of an automobile. He was sentenced to three years confinement, reduction in rating to apprentice seaman, and a dishonorable discharge. These proceedings were reviewed and approved on October 7, 1944. Plaintiff made no attempt to appeal this conviction.

On February 23, 1967, plaintiff petitioned the Board for Correction of Naval Records to have his discharge change to honorable on the basis that the court-martial failed to consider certain evidence. This petition was denied on May 29, 1968. Plaintiff has made no further applications to the Board for Correction of Naval Records or to the Judge Advocate General for the correction of his military records.

Plaintiff filed this suit and counsel was appointed in October of 1970.

WHEREFORE, your deponent prays for an order pursuant to Rule 12(b) of the Federal Rules of Civil Procedure, dismissing plaintiff's complaint and an order pursuant to Rule 56 of the Federal Rules of Civil Procedure granting summary judgment for defendant and against plaintiff and for such other and further relief as to this Court may seem just and proper.

Dated: Brooklyn, New York—April 21, 1971

/s/ Bruce F. Smith  
BRUCE F. SMITH  
Assistant U. S. Attorney

SWORN to before me this 21st day of April, 1971.

/s/ Lloyd H. Baker  
LLOYD H. BAKER  
Notary Public

IN THE  
UNITED STATES DISTRICT COURT  
FOR THE  
EASTERN DISTRICT OF NEW YORK

Civil Action No. 70-C-1267

JOHN W. FLEMINGS, PLAINTIFF

v.

JOHN N. CHAFEE,  
Secretary of the Navy, DEFENDANT

STATEMENT OF MATERIAL FACTS

Pursuant to Rule 9(g) of the General Rules of this Court, the following is the plaintiff's statement of material facts as to which there is no dispute:

1. In August, 1944 the plaintiff was an enlisted man in the United States Navy, stationed at Earle, New Jersey.
2. While he was absent from his station, the plaintiff was arrested in August 1944 for auto theft.
3. The stolen auto was a civilian car (Chevrolet sedan), stolen from one Ernest Bush, a civilian, who was in no way connected with the military.
4. The car was stolen in Trenton, New Jersey, and was not taken from a military base.
5. Plaintiff was apprehended by two Pennsylvania state troopers in Hollidaysburg, Pennsylvania, in an area not under military control.
6. Plaintiff was delivered by civil authorities to Naval personnel and eventually transported to Harts Island, New York.
7. Plaintiff was charged, tried, convicted and sentenced as more fully appears in the record of proceedings appended to defendant's answer.
8. The civilian courts of both New Jersey and Pennsylvania were open at the time of plaintiff's arrest, and auto theft was a crime cognizable in the civilian courts of those states.

9. In February, 1967, plaintiff petitioned the Board for Correction of Naval Records to change his dishonorable discharge to one issued under honorable conditions.

10. On May 29, 1968 the Board for Correction of Naval Records denied plaintiff's request, as more fully appears in Exhibit B attached to annexed affidavit of counsel for plaintiff.

Respectfully submitted,

/s/ Michael Meltsner  
MICHAEL MELTSNER  
435 West 116 Street  
New York, New York 10027  
(212) 280-3867  
Attorney for Plaintiff

JDP:BFS:eh

File No. 702098

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

Civil Action No. 70 C 1267

UNITED STATES OF AMERICA ex rel.  
JOHN W. FLEMINGS, PLAINTIFF

against

HON. JOHN H. CHAFEE,  
Secretary of the Navy, DEFENDANT

STATEMENT OF MATERIAL FACTS

Pursuant to Rule 9(g) of the General Rules For the Southern and Eastern Districts of New York, defendant presents, in support of his motion for summary judgment, a statement of material facts as to which he contends there is no genuine issue to be tried:

1. In August, 1944, plaintiff was an enlisted man in the United States Naval Reserve, stationed at Earle, New Jersey.
2. While he was absent without leave from his station, plaintiff was arrested by civilian authorities for auto theft.
3. The stolen automobile was owned by a civilian, one Ernest Bush.
4. The car was stolen in Trenton, New Jersey.
5. Plaintiff was turned over to naval authorities and was transported to Harts Island, New York.
6. Plaintiff was charged with being absent without leave and auto theft and was tried, convicted and sentenced in 1944, as more fully appears in the Record of Proceedings annexed to defendant's answer.
7. Plaintiff took no appeal from his conviction.
8. In February, 1967, plaintiff petitioned the Board for Correction of Naval Records to Change his dishonor-

able discharge to one issued under honorable conditions on the basis of the court martial's failure to consider certain evidence.

9. On May 29, 1968, the Board for Correction of Naval Records denied plaintiff's request, granting him leave to resubmit his petition should new information become available.

10. On June 2, 1969, the Supreme Court rendered its decision in *O'Callahan v. Parker*, 395 U.S. 258 (1969).

Respectfully submitted,

/s/ Bruce F. Smith  
BRUCE F. SMITH  
Assistant U. S. Attorney  
Of Counsel for Defendant

JDP:BFS:eh

File No. 702098

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

Civil Action No. 70 C 1267

UNITED STATES OF AMERICA ex rel.  
JOHN W. FLEMINGS, PLAINTIFF

against

HON. JOHN H. CHAFEE,  
Secretary of the Navy, DEFENDANT

STATEMENT OF MATERIAL FACTS

Pursuant to Rule 9(g) of the General Rules For the Southern and Eastern Districts of New York, defendant presents, in opposition to plaintiff's motion for summary judgment, a statement of material facts as to which it is contended there exists a material issue to be tried:

1. Whether Ernest Bush was in no way connected with the military.
2. Whether the stolen car was taken from a military base, and was in no way involved with a military duty.
3. Whether plaintiff was in uniform at the time of the alleged theft or his subsequent apprehension.

Respectfully submitted,

/s/ Bruce F. Smith  
BRUCE F. SMITH  
Assistant U. S. Attorney  
Of Counsel for Defendant

## EXHIBIT B

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

Civil Action No. 70 C 1267

UNITED STATES OF AMERICA ex rel.  
JOHN W. FLEMINGS, PLAINTIFF

against

HON. JOHN H. CHAFEE,  
Secretary of the Navy, DEFENDANT

## AFFIDAVIT OF ANDREW COOPER

State of New York                    )  
  ) ss.:  
County of New York                )

ANDREW COOPER, being duly sworn, deposes and says that:

I am a third-year student at Columbia University School of Law, 435 West 116th Street, New York. I reside at 205 West 107th Street, New York. I am presently a student assistant Professor Michael Meltsner, who represents plaintiff John W. Flemings in the above-styled cause.

On Saturday, April 24, 1971, at the direction of Professor Meltsner, I telephoned Mr. Ernest Bush, 315 Garfield Avenue, Trenton, New Jersey (609-392-7357). Mr. Bush stated to me that he was the owner of a 1942 Chevrolet sedan, which was stolen on or about August 17, 1944, while parked on Calahoune Street in the city of Trenton. According to Mr. Bush, the automobile was stolen at approximately 11 o'clock a.m. after the vehicle had been parked on a city street to allow Mr. Bush to run a personal errand. Mr. Bush stated to me that the car was not taken from a military base, and was not employed by him for any military purpose. Although Mr. Bush was a member of the United States Signal

Corps at the time, he resided off-based and received no compensation whatsoever from the military for use of the vehicle. Mr. Bush stated that he did not observe the theft of the vehicle.

Dated: New York, New York—April 26, 1971

/s/ Andrew Cooper  
ANDREW COOPER

Subscribed and sworn to before me this 26 day of April, 1971.

/s/ Celeia Schlesinger  
Notary Public

IN THE  
UNITED STATES DISTRICT COURT  
FOR THE  
EASTERN DISTRICT OF NEW YORK

Civil Action No. 70-C-1267

JOHN W. FLEMINGS, PLAINTIFF

v.

JOHN H. CHAFEE,  
Secretary of the Navy, DEFENDANT

ORDER

Plaintiff's motion for summary judgment and defendant's motion to dismiss and cross-motion for summary judgment having been brought on for hearing on April 27, 1971, and the same having been duly heard and submitted to the Hon. Jack B. Weinstein, by Bruce F. Smith, Assistant United States Attorney of counsel for defendant, and Michael Meltner, Esq. for plaintiff, it is noted that plaintiff has agreed to make application in accordance with prescribed procedure to the Board for Correction of Naval Records, pursuant to 10 U.S.C. § 1552, and to the Judge Advocate General, United States Navy, pursuant to 10 U.S.C. § 869, for correction of his military records on the ground that the court-martial that convicted him in 1944 lacked jurisdiction over the alleged auto theft of which he was accused, and it is

ORDERED, that this Court retains jurisdiction over this case pending plaintiff's applications to the Judge Advocate General, United States Navy, and the Board for Correction of Naval Records, and final decision rendered thereon. Should final decision on either or both such applications not be made within 60 days from the date of submission of such applications, this Court will proceed to a determination of the motions submitted.

Dated: New York, New York—April 30, 1971.

SO ORDERED:

/s/ Jack B. Weinstein  
JACK B. WEINSTEIN  
U.S.D.J.

Civil Action No. 70/C/1267

V.

STATE OF PENNSYLVANIA )  
 ) ss.:  
COUNTY OF CENTRE )

JOHN W. FLEMINGS, having been duly sworn, deposes and says:

/s/ John W. Flemings  
JOHN W. FLEMINGS

Sworn to before me this 10 day of May 1971

**/s/ Mahlon E. King**  
**Notary Public**

**Mahlon E. King, Notary Public  
Benner Twp., Centre County, Pa.  
My Commission expires April 22, 1972**

IN THE  
UNITED STATES DISTRICT COURT FOR THE  
EASTERN DISTRICT OF NEW YORK

No. 70/C/1267

JOHN W. FLEMINGS, PLAINTIFF

v.

JOHN H. CHAFEE,  
Secretary of the Navy, DEFENDANT

STATE OF NEW YORK        )  
                                  ) ss.:  
COUNTY OF NEW YORK    )

AFFIDAVIT OF COUNSEL FOR PLAINTIFF

MICHAEL MELTSNER, being duly sworn, deposes and says that I am counsel for plaintiff in the above-styled cause and I make this affidavit to bring to this Court's attention events which have occurred subsequent to the Court's order of April 30, 1971.

In accordance with prescribed agency procedures, by letters dated May 10, 1971, I renewed plaintiff's application to the Board for Correction of Naval Records that he be issued an honorable discharge and applied to the Judge Advocate General of the Department of the Navy for similar relief pursuant to Article 69, Uniform Code of Military Justice. (Copies of my letters of May 10, 1971 are attached herewith as Exhibits A and B, respectively.)

By letter of May 21, 1971 from Captain K. A. Konopisos, Deputy Assistant Judge Advocate General, I am informed that the Judge Advocate General has determined that no action to modify plaintiff's sentence is warranted. Attached to Captain Konopisos' letter is a formal "Examination Pursuant to Article 69 UCMJ . . ." stating reasons for the determination of the Judge Advocate General. (Copies of the letter and "Examination Pursuant to Article 69 UCMJ . . ." are attached herewith as Exhibit C.)

By letter of May 24, 1971, Charles E. Curley, Executive Secretary, Department of the Navy, Board for Correction of Naval Records, has informed me that the Board has denied plaintiff's request for reconsideration. (A copy of Mr. Curley's letter is attached herewith as Exhibit D.)

Plaintiff has now fully exhausted available administrative remedies. Pursuant to the order of April 30, 1971, the Court now appropriately proceeds "to a determination of the motions submitted" on April 27, 1971.

/s/ Michael Meltsner  
MICHAEL MELTSNER  
Attorney for Plaintiff  
435 West 116 Street  
New York, N.Y. 10027

Sworn to before me this 1st day of June, 1971.

/s/ Phyllis M. Dzierzynski

## EXHIBIT A

May 10, 1971

Charles E. Curley  
Executive Secretary  
Board for Correction of Naval Records  
Department of the Navy  
Washington, D.C. 20370

Dear Mr. Curley:

On October 29, 1970, I wrote to inform you that I had been appointed by Jack B. Weinstein, United States District Judge for the Eastern District of New York, to serve as counsel for Mr. John W. Flemings in an action (No. 70/C/1267) that Mr. Flemings has filed to compel the Secretary of the Navy to correct his dishonorable discharge. In this action the Secretary is represented by Assistant United States Attorney Bruce F. Smith.

On April 27, 1971, Judge Weinstein heard arguments from counsel on a motion for summary judgment, filed by Mr. Flemings, and a cross-motion for summary judgment and a motion to dismiss filed by the Secretary. In sum, these motions ask the Court to decide whether the court-martial which convicted plaintiff of theft in 1944 and sentenced him to a dishonorable discharge, as well as other penalties, was without jurisdiction to do so.

At the suggestion of the Assistant United States Attorney that administrative remedies had not been exhausted, Judge Weinstein agreed to hold the motions pending before him under advisement for 60 days in order to permit the Board for Correction of Naval Records, pursuant to 10 USC § 1552, and the Judge Advocate General, pursuant to 10 USC § 869, to re-examine plaintiff's claim that he is entitled to a correction of his discharge status.

In order that you may promptly consider plaintiff's claim in this regard, in addition to your own file (docket number 193-67) I herewith submit the following documents for your consideration:

(1) My affidavit of March 19, 1971 and exhibits attached;

(2) Plaintiff's memorandum in support of motion for summary judgment;

(3) My affidavit in opposition to cross-motion and motion to dismiss and exhibits attached.

In my judgment, the Board should direct itself, *inter alia*, to the following questions.

1. Whether the Supreme Court's decision in *O'Callahan v. Parker*, 395, U.S. 258 is retroactive in its effect.

2. Whether, if *O'Callahan*, *supra*, is retroactive, it entitles plaintiff to an honorable discharge.

I also enclose form 22-R009 and a waiver of notice form. The papers submitted present plaintiff's position on these questions. If I can be of further assistance to you in supplying you with information pertinent to this application please do not hesitate to contact me.

Sincerely,

MICHAEL MELTSNER  
Associate Professor of Law

MM/sg

enclosures

cc: Bruce F. Smith, Esq.

## EXHIBIT B

May 10, 1971

Office of the Judge Advocate General, Navy  
Department of Defense  
Washington, D.C. 20370

Gentlemen:

On October 29, 1970, I was appointed by Jack B. Weinstein, United States District Judge for the Eastern District of New York, to serve as counsel for Mr. John W. Flemings in an action (No. 70/C/1267) that Mr. Flemings has filed to compel the Secretary of the Navy to correct his dishonorable discharge. In this action, the Secretary is represented by Assistant United States Attorney Bruce F. Smith.

On April 27, 1971, Judge Weinstein heard arguments from counsel on a motion for summary judgment filed by Mr. Flemings, and a cross-motion for summary judgment and a motion to dismiss filed by the Secretary. In sum, these motions ask the Court to decide whether the court-martial which convicted plaintiff of theft in 1944 and sentenced him to a dishonorable discharge, as well as other penalties, was without jurisdiction to do so.

At the suggestion of the Assistant United States Attorney that administrative remedies had not been exhausted Judge Weinstein agreed to hold the motions pending before him under advisement for 60 days in order to permit the Board for Correction of Naval Records, pursuant to 10 USC § 1552, and the Judge Advocate General, pursuant to 10 USC § 869, to re-examine plaintiff's claim that he is entitled to a correction of his discharge status.

In order that you may promptly consider plaintiff's claim in this regard, in addition to the file of the Board for Correction of Naval Records on this matter (docket number 193-67) I herewith submit the following documents for your consideration:

(1) My affidavit of March 19, 1971, and exhibits attached;

(2) Plaintiff's memorandum in support of motion for summary judgment;

(3) My affidavit in opposition to cross-motion and motion to dismiss and exhibits attached.

In my judgment your office should direct itself, *inter alia*, to the following questions:

1. Whether the Supreme Court's decision in *O'Callahan v. Parker*, 395, U.S. 258 is retroactive in its effect.

2. Whether, if *O'Callahan, supra*, is retroactive, it entitles plaintiff to an honorable discharge.

I also enclose form 22-R009. The papers submitted present plaintiff's position on these questions. If I can be of further assistance to you in supplying you with information pertinent to this application please do not hesitate to contact me.

Sincerely,

/s/ MICHAEL MELTSNER  
Associate Professor of Law

MM/sg

enclosures

cc: Bruce F. Smith, Esq.

## EXHIBIT C

[SEAL]

DEPARTMENT OF THE NAVY  
OFFICE OF THE JUDGE ADVOCATE GENERAL  
WASHINGTON, D. C. 20370

Michael Meltsner, Esq.  
Associate Professor of Law  
Columbia University  
School of Law  
435 West 116th Street  
New York, NY 10027

In Reply Refer to  
JAG:203:LGB:nb  
Ser: 4261  
21 May 1971

Re: General court-martial of Seaman Second Class  
John W. FLEMINGS, U. S. Naval Reserve, 924 24  
27; sentence adjudged 2 October 1944

Dear Mr. Meltsner:

In reference to your letter of 10 May 1971, you are advised that the record of trial in subject case has been examined in this office pursuant to Article 69, Uniform Code of Military Justice. As indicated by the enclosed copy of the Denial of Relief by the Judge Advocate General and for the reasons stated therein, no action to modify the findings or sentence is warranted.

Sincerely,

/s/ K. A. Konopisos  
K. A. KONOPISOS  
Captain, JAGC, U. S. Navy  
Deputy Assistant Judge  
Advocate General  
(Military Justice)

Enclosure

Copy to (w/encl):

Accused

COMTHREE&TF COM EASTSEAFRON

Service record

Record of Trial

BUPERS

## EXHIBIT C

JAG:203:LGB:nb

IN THE OFFICE OF THE  
JUDGE ADVOCATE GENERAL OF THE NAVY

UNITED STATES

v.

JOHN W. FLEMINGS

924 24 27

Seaman Second Class

U. S. Naval Reserve

Examination pursuant to Article 69, UCMJ, of general court-martial convened by Commandant, Third Naval District, and Task Force Commander, Eastern Sea Frontier at U. S. Navy Yard, New York, New York

Sentence adjudged 2 October 1944

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20 May 1971

---

In accordance with his pleas, the Petitioner was found guilty by general court-martial at the United States Navy Yard, New York on October 2, 1944. He was charged with: Charge I: Unauthorized absence for a period of about thirteen days, and Charge II: Theft of an automobile. He entered pleas of guilty to both charges and was so found by the court. He was sentenced to be reduced to the rate of Seaman Apprentice, to be confined for a period of three years, and to be dishonorably discharged from the naval service. The Convening Authority, on October 7, 1944, approved the findings and sentence.

The Petitioner, through his attorney has raised the issue of whether the Supreme Court's decision in *O'Callahan v. Parker*, 395, U. S. 258, is retroactive in its effect; and whether if *O'Callahan, supra*, is retroactive, does it entitle the Petitioner to an honorable discharge?

The United States Court of Military Appeals has held

in several recent cases that *O'Callahan, supra*, applies prospectively only. It affects those cases not final as of June 1969, but not those on which appellate review was complete as of that date.

"The effect of the *O'Callahan* decision may be viewed as extending to members of the armed forces in some circumstances constitutional rights of grand jury indictment and trial by petit jury. Such a view conduces to only a prospective application of the extension. *Gosa v Mayden*, 305 F Supp 486 (sic) (ND Fla) (1969). Other possible justifications for prospective effect are the thoughts that *O'Callahan* did not rule on the existence of subject-matter jurisdiction, that it limited the *exercise* of such jurisdiction, and that this limitation is functional only. *United States v King*, ACM 20361, July 30, 1969."

The court further stated:

"As in many of the cases affected, the accused in the case *sub judice* pleaded guilty. How could it be argued that he has been subjected to an unfair trial on the issue of his guilt? Second, the armed forces undoubtedly relied on the absence of any earlier indication that anything other than status limited the authority of Congress to make crimes punishable by court-martial. Finally, when a holding of general retroactivity would place countless conviction for serious crimes in jeopardy and would often result not in a retrial by a civilian court but an avoidance of further trial, we have no difficulty in concluding that the disruption of the administration of justice would be substantial.

"The petition is denied." *Mercer v. Dillon*, 19 USCMA 264, 41 CMR 264 (1970).

In the case of *Hooper v. Laird*, 19 USCMA 329, 41 CMR 329 (1970), the Petitioner applied for writ of coram nobis to the United States Court of Military Appeals, and the substance of his request was a request for retroactive application of *O'Callahan, supra*.

"As in *Mercer v. Dillon*, 19 USCMA 264, 41 CMR 264 (1970), the Court is not unanimous in viewing the consideration of extraordinary relief in this instance as being in aid of its jurisdiction, as section 1651 of Title 28, United States Code, requires, but the majority position on that issue has resulted in our addressing the petition on its merits.

"For the reasons outlined in *Mercer*, we held that the decision in *O'Callahan* applied only to those cases still subject to direct review by this Court on June 2, 1969, the date of the *O'Callahan* opinion. The *Mercer* decision controls our decision in this case. Accordingly, the petition is denied."

The question of retroactivity has also been ruled on by various federal courts. See: *Conn v. Hayden*, 305 F. Supp. 1186 (ND FLA) (1969), and *Thompson v. Parker*, 308 F. Supp. 904 (DC PA) (1970), the courts generally holding that retroactivity is not to be applied.

In light of the foregoing, examination of this case pursuant to Article 69, UCMJ, discloses no error prejudicial to the substantial rights of the accused or other grounds for relief under Article 69. Accordingly, no action to vacate or modify the findings or sentence as approved is warranted.

K. A. KONOPISOS  
By direction

Copy to:

Accused  
COMTHREE&TFCOM EASTSEAFRON  
Service record  
BUPERS

Michael Meltsner, Esq.

Certified to be a true copy:

/s/ L. G. Bohlen  
L. G. BOHLEN  
LTCOL, USMC

## EXHIBIT D

[SEAL]

DEPARTMENT OF THE NAVY  
BOARD FOR CORRECTION OF NAVAL RECORDS  
WASHINGTON, D. C. 20370

24 May 1971

Michael Meltsner, Esquire  
Columbia University School of Law  
435 West 116th Street  
New York, New York 10027

Dear Mr. Meltsner:

This will acknowledge receipt of your letter of 10 May 1971 by which you forwarded an application, DD 149, dated 9 May 1971, and related documents, on behalf of Mr. John W. Flemings.

By his application Mr. Flemings requests, in effect, that a dishonorable discharge of 23 October 1946 be changed to a discharge under honorable conditions, and contends that the court-martial which sentenced him to be dishonorably discharged was without jurisdiction. In support of his contention he cites the case of O'Callahan v. Parker, 395 U.S. 258.

The Board's records show that by a previous application, DD 149, dated 23 February 1967, Mr. Flemings requested that his discharge be changed. He did not submit his request before 26 October 1961, as required by 10 USC 1552. He had been previously advised by the Board's letter of 15 February 1967 that the Board is not empowered to disturb the findings of a court-martial nor to predicate relief on alleged legal error in a court-martial record.

Records pertaining to Mr. Flemings' naval service were assembled and reviewed. They did not disclose that he petitioned the Judge Advocate General to grant a new trial or for other relief pursuant to the authority contained under Section 12 of the Act of May 5, 1950, 50 U.S.C. 70. The records did disclose that he was tried

by general court-martial on 2 October 1944 and convicted of Charge I, Absence from Station and Duty after Leave had Expired, Charge II, Theft, and the specifications thereunder. His approved sentence provided, *inter alia*, that he be confined for a period of three years and that he be dishonorably discharged. During the period of his confinement he was punished because of eleven disciplinary infractions.

The Board's review was limited to determining whether or not the court-martial sentence, as approved, was so severe as to constitute an injustice. The Board, not being empowered to determine whether or not court-martial findings are legal, did not make a determination as to the validity of the court-martial findings. The Board determined that insufficient evidence had been presented to indicate the existence of probable error or injustice and denied the application. Mr. Flemings was advised of the denial by the Board's letter of 29 May 1968.

The Board for Correction of Naval Records is established pursuant to the authority contained in 10 USC 1552, and enables the Secretary of the Navy, acting through the Board, to correct an error or remove an injustice in or from a military record. This legislation relieved the Congress of the burden of considering private relief bills theretofore introduced to accomplish such changes. A private relief bill did not have the legal efficacy of disturbing the conclusiveness of a court-martial conviction. Since a private relief bill did not address the conclusiveness of a court judgment, the Board is not deemed or considered to have any greater relief power than its historical antecedent.

By statute, Congress has specifically provided that court-martial proceedings, findings, and sentences "are final and conclusive" and "are binding upon all departments, courts, agencies, and officers of the United States," 10 USC 876. In consonance with this statutory prescription, and relying on an opinion of the Attorney General, 40 Op. Atty. Gen., 504 (1947), the Judge Advocate General

of the Navy has consistently held that the Board for Correction of Naval Records does not have the authority to infringe on the finality and conclusiveness of the proceedings, findings, and sentence of a court-martial. Accordingly, the Judge Advocate General has held that, in determining whether error or injustice exists, the Board may not predicate its determination upon alleged irregularities of law or procedure appearing in a court-martial record.

In view of the foregoing, Mr. Flemings' application of 9 May 1971 is construed as a request for reconsideration of the Board's previous denial. No new and relevant evidence having been submitted, and the Board not being empowered to determine the legality of the court-martial findings, the request is denied.

Sincerely yours,

/s/ Charles E. Curley  
CHARLES E. CURLEY  
Executive Secretary

## SUPREME COURT OF THE UNITED STATES

No. 71-1398

JOHN W. WARNER,  
Secretary of the Navy, DEFENDANT

v.

JOHN W. FLEMINGS

ORDER ALLOWING CERTIORARI. Filed June 19, 1972.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted, and the case is set for oral argument with No. 6314.